U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: DEC 2 1 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The petitioner filed a motion to reopen and reconsider the AAO's decision. The AAO dismissed the motion to reconsider, granted the motion to reopen, and affirmed the dismissal of the appeal. The matter is now before the AAO on another motion to reopen. The AAO will dismiss the motion.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. The petitioner seeks employment as an urban forester at the University of California, San Diego (UCSD). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The AAO reversed the director's finding that the petitioner does not qualify for classification as an alien of exceptional ability in the sciences, and affirmed the finding that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The AAO discussed the statutory language and case law concerning the national interest waiver in its two prior decisions dated January 19, 2012 and September 5, 2012, both incorporated here by reference. In short, section 203(b)(2)(A) of the Act requires an alien of exceptional ability in the sciences to have a job offer (including labor certification) from a United States employer, but section 203(b)(2)(B) of the Act permits immigration authorities to waive that requirement in the national interest.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), lists several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that he seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that he will serve the national interest to a substantially greater degree than would an available United States worker with the same minimum qualifications.

The petitioner filed the Form I-140 petition on September 3, 2009. The director denied the petition on August 6, 2010, and the AAO dismissed the appeal on January 19, 2012. The AAO found that the petitioner had satisfied the first two prongs of the *NYSDOT* national interest test, but had not shown that he will serve the national interest to a substantially greater degree than would an available United States worker with the same minimum qualifications.

In his first motion to reopen, the petitioner submitted information and evidence regarding his activities between 2007 and 2011. When the AAO issued its second decision on September 5, 2012, the AAO stated: "An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). . . . The AAO will limit consideration to endeavors that predate the filing of the petition."

In its September 2012 decision, the AAO acknowledged the petitioner's statement, below:

> The UC San Diego Urban Forest Management Plan . . . which I wrote in 2008, and which was cited in a consulting ecologist's 2009 report on the campus forest's environmental benefits . . . , was recently tagged **'a great teaching tool'** by Amy Hoffman, a Registered Landscape Architect and faculty at NewSchool of Architecture, San Diego. . . She found the Plan on the Internet. There is no knowing how many other professionals all over the country are also using the Plan as a resource.

The AAO noted that the petitioner had not shown his plan to be in widespread use. Rather, he had shown that other foresters have access to the plan. The AAO found that, without evidence of its impact, the plan's mere existence is not presumptive evidence of eligibility for the waiver.

Despite the AAO's explanation that the petitioner's activities in 2011 and 2012 cannot retroactively show that USCIS could or should have approved the petition in 2009, several exhibits submitted on motion relate to the beneficiary's recent activities. Those activities include an address that the petitioner delivered to an Arbor Day Foundation gathering on November 14, 2011; a "Carbon Offset Conference" in late 2012; and a presentation to the Inland Urban Forest Council on September 7, 2012. These materials show that the petitioner disseminated his work outside the UCSD campus several years after the 2009 filing date, but not that those ideas were in widespread use in 2012 or, more importantly, in 2009. Eligibility depends on the impact of one's work at the time of filing, not on the potential for possible impact years later. The petitioner cannot establish eligibility as of the 2009 filing date by traveling around the country years later to promote his Urban Forest Management Plan.

The petitioner submits copies of internal UCSD materials, such as an electronic slide presentation that the petitioner himself prepared in 2005, and the minutes of a July 24, 2006 meeting of UCSD's Park Committee. These materials, and new affidavits from three UCSD officials, establish that the petitioner plays an important role within UCSD's urban forestry program, but they do not address the fundamental issues repeatedly raised in the previous three USCIS decisions on the petition.

The petitioner submits a copy of an October 4, 2012 affidavit from [redacted], who served [redacted] from 1985 to 1988. [redacted] states that he "invited [the petitioner] . . . to give a special presentation at the August 1987 Workshop on 'Forest Management Practices in Semi-arid areas of Northern Nigeria.'" [redacted]. [redacted] states that the petitioner "did an outstanding job of teaching this relatively new concept to forestry personnels [*sic*] of varying experience levels in an easy-to-understand and easy-to-do way." Like the other materials submitted on motion, this affidavit does not address the heart of the concerns expressed first by the director and later by the AAO.

The regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. Based on the plain meaning of "new," evidence that was previously available and which the petitioner could have been discovered or presented earlier in the proceeding does not establish "new facts."[1] Recently executed affidavits containing old information that the petitioner could have submitted previously are not "new" in this sense.

At the same time, because the petitioner must establish eligibility at the time of filing, evidence submitted on motion must be "new" but must serve to demonstrate that the petitioner was eligible, and his petition approvable, at the time of filing in 2009. The AAO need not repeatedly reopen the proceeding in response to motion after motion detailing the petitioner's latest activities. To entertain multiple motions in this way would needlessly prolong the proceeding to no net effect.

Review of the evidence newly submitted on motion reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence submitted was previously available and the petitioner could have submitted it earlier in the previous proceeding. None of the evidence submitted on motion specifically addresses points that the AAO raised in its most recent decision, and which (therefore) the petitioner has not had a previous opportunity to address. The evidence submitted on motion does not relate to "new facts" and the AAO does not consider it to be a proper basis for a motion to reopen.

USCIS disfavors motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the petitioner has not met that burden. The AAO will dismiss the motion to reopen.

ORDER: The motion is dismissed.

---

[1] The relevant definitions of the word "new" are "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New College Dictionary* 736 (2001) (emphasis in original).